Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

EDWARD S. NIELSEN, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On petition for Writ of Certiorari
To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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OVERVIEW

IRS documents discovered after trial showed the prosecution did not advise the defense that three government witnesses, including the main witness, had each been levied with IRS tax penalties of over $300,000 as important persons in connection with the same company's unpaid excise taxes as in the case against defendant. In reviewing the § 2255 motion, the trial judge wrote that it was "important that the three witnesses were in agreement" regarding the important issue of the defendant's intent.

QUESTION PRESENTED FOR REVIEW

Whether the Appeal Court's decision regarding *Brady* violations of suppressed IRS penalty assessments of over $300,000 against each of three witnesses and suppressed favorable IRS tax audit results was improperly reviewed under the Amendment V due process rights and under the Amendments V and VI jury trial rights.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The decision of the Ninth Circuit Court of Appeals in the direct appeal has been published at 1 F.3d 855 (9th Cir. 1993).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Ninth Circuit Court's memorandum decision filed October 27, 1997, and the subsequent order denying rehearing and rejecting rehearing en banc filed January 15, 1998, under Supreme Court Rule 10.1(a), § 1254(1) of 28 U.S.C., and Article III of the Constitution.

STATUTE AND RULE INVOLVED

This case involves the responsibilities of the prosecutor to disclose to the defense evidence that is favorable to the accused.

> ***Brady* Rule**
> Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S., at 87, 835 S.Ct., at 1196-97.

> **Amendment V**
> (*in pertinent part*)
> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Defendant Nielsen, senior financial officer of the company, Mid Pacific Airlines, was convicted of three counts of aiding and abetting the submission of fraudulent quarterly excise tax returns, and received the maximum term of three three-year sentences, two served concurrently and one suspended.

After Nielsen's unsuccessful direct appeal and while preparing a § 2255 motion, Nielsen discovered the government had failed to disclose, after proper request, that the IRS had assessed major tax penalties related to underpaid excise taxes against three other employees of Mid Pacific Airlines. Also, Nielsen discovered the favorable results of an earlier excise tax audit at Nielsen's previous airline employer which contradicted the unsubstantiated hearsay-type testimony of a fourth government witness. The government's response to a pretrial defense request assured there was no *Brady*-type evidence to disclose. An identified IRS representative sat with and assisted the prosecution during trial.

Nielsen's pro se § 2255 motion was denied by the district court and the appeal court reviewed and affirmed, pursuant to 28 U.S.C. 2255. Nielsen is currently on probation.

Undisclosed tax penalty assessments could have impeached the creditability of three witnesses

The trial court reviewed the elements of proof required, going into the element of "intent" in detail and several times. The trial court stated that it was important "that these three witnesses were in agreement regarding the important issue of why Nielsen underpaid the excise taxes." DC Opinion at page 11a.

The penalty assessments meant, at the least, that the government considered all three witnesses as persons responsible for underpayment of excise taxes, indicted or not. The amounts were as follows: Gustafson, manager of budgets and reports for the company; $617,933; Manuel, company controller, $310,960; Leininger, subsequent chief financial officer, $310,960.

Gustafson was the government's chief witness. There is an indication the assessment against him was subsequently reduced. He was indicted with Nielsen as a co-defendant, pled guilty to one of three charges, and received a six-month suspended sentence.

Manuel was also called as a witness for the defense, without revealing the secret tax penalty assessed against him. Nielsen's § 2255 motion complained about Manual's failure to respond to defense questions.

The Appeal Court wrote, without explanation, that Nielsen's appeal did not demonstrate the materiality of the suppressed tax penalty assessments.

The lack of explanation regarding the materiality element makes the appeal a matter of guesswork, since Nielsen made the following claims regarding the secret assessments:

1. The penalty assessments were coercive holds over the actions and testimony of the witnesses because the government had the authority to levy or cancel the large assessments at will, without disclosure or substantial justification.

2. Given the Draconian authority of the government, the coercive nature of the assessment obligations was impeachment evidence that could be used to attack the credibility and character of the three important witnesses by showing that each had a substantial money interest in saying whatever the government wanted said, or not said. The looming assessment obligation with the government's Draconian collection procedures could have had each witness thinking, "Better him than me."

3. The assessment evidence was material because the trial court considered the sameness of the testimony of these witnesses important to the government's case and the jury could have believed the government had directly or indirectly influenced or coerced each testimony by the levy of the large assessments, with the reward of cancellation if the testimony was favorable to the government and Nielsen was convicted.

4. Failure to disclose the tax penalty assessments when the credibility of the witnesses and the "in concert" testimony of the witnesses was important to the government's case was a failure under the *Brady* rule.

5. The suppressions interfered with counsel's cross-examination of the four government witnesses, with counsel's argument against admission of and the trial court's evaluation of Rule 404(b) evidence, with counsel's trial strategy, with counsel's two motions for verdict of acquittal, and with counsel's defense argument.

6. The suppressions interfered with Nielsen's decision to testify.

7. The suppressions mislead the trial court and interfered with the sentencing because the sentence was based in part on the unproven bad act alleged by witness Ferrif. (see following)

Suppressed IRS audit results contradicted testimony that included a non-existent prior bad act

A fourth witness' testimony regarding Nielsen's alleged statement also went to intent.

Favorable results of an excise tax audit during defendant's previous employment at another airline were suppressed. The results contradicted another government witness, Ferrif, who testified Nielsen said he had "done the same thing [underpaid excise taxes] at another airline." The statement was not excluded as hearsay evidence because it was attributed to the defendant. The audit results showed the bad act alleged in the statement did not exist. Nielsen claimed he did not make the statement and did not underpay excise taxes. There were no other witnesses to the alleged statement by Nielsen. An F.R.E. 404(b) objection at a pre-trial hearing was denied.

The trial court ignored the inclusion of a non-existent prior bad act in Ferrif's testimony, and focused on the alleged statement as a showing of intent. The Appeal Court's

memorandum decision omitted any mention of the suppressed audit results as a *Brady* claim.

REASONS FOR GRANTING THE WRIT

The suppressed IRS tax penalty assessments and suppressed audit results were a violation of the *Brady* disclosure rule and the Amendments V and VI rights to have a jury determine guilt beyond a reasonable doubt.

The result in this case shows how great a deviation from the intent of the *Brady* Court can be achieved by a reviewing court.

The Government refused to reveal that the IRS had levied tax penalties against three witnesses, including the chief witness, which the defense could have used to impeach their credibility and character by showing each had a money-interest to do well by the government in testimony, and each had been considered by the IRS as having done the same thing as the defendant.

A large IRS tax penalty assessment kept in secret must be considered carefully. The penalty can be levied on those the IRS considers as having been significantly involved in the underpayment of excise taxes, indicted or not. A substantial money interest exists, the pending extraction over $300,000 from one's current assets and future earnings being a powerful motivator. The government is at liberty to make secret penalty assessments almost at will, accountable to no one. A penalty can be levied or cancelled by the IRS with only the slightest justification, if any is required at all, with no public record. An unfortunate witness can incur the wrath of the government with mere disclosure of the penalty to the defense. Enforcing or abating the penalty is outside of any reward or sanction the

prosecution might seek from the court at sentencing, and exercised entirely as the government may choose.

The government also refused to reveal results of a previous IRS excise tax audit which were favorable to the defense in contradicting testimony of another government witness. The only defense against the alleged statement referring to a prior crime was to show that the crime did not occur. The IRS audits were critical proof to show there was no prior crime. Lacking a prior crime, there could be no showing of prior intent, and Nielsen's knowledge was amply discussed elsewhere during the trial.

There is no normal opportunity to discover this level of suppression, other than direct request, because the incentive for all is to keep it undisclosed. Thus, the suppression of several large IRS tax penalty assessments and audit results can not be considered immaterial. Such a series of suppressions amounts to a program of calculated coercion and manipulation.

The refusal to disclose the penalty assessments and audit results shows the government considered the possible revelation of multiple *Brady* Rule violations as having no threat of serious consequence. The odds against discovery, compounded with the odds against reversal, offered an appealing opportunity. Further, with such a cavalier approach to fair play displayed by the government, there can be no confidence that other witnesses were not also under the threat of secret penalty assessments.

These suppression violations are reviewed cumulatively, rather than one by one, to determine if, in the absence of disclosure, Nielsen received a fair trial. *Kyles v. Whitley*, 486 U.S. 1027, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995).

Review of the cumulative suppression suggests reversal because the cumulative suppressions was requested from the government, favorable to defendant's case, and affected the creditability and testimony of four witnesses who determined the "intent" element of proof under *Brady*, *Giglio* and *Agurs*. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194. (1963); *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Reversal is suggested under *U.S. v. Bagley* because a government program of intentional suppression undermines confidence in the outcome of the trial. Further, disclosure of such a program of suppression would have had a reasonable probability of changing the outcome of the trial. *U.S. v. Bagley*, , 473 U.S. 667, 105 S.Ct. 3375 (1985). The trial can not be called fair without the information. *Kyles*, 115 S.Ct., at 1566.

However, *Bagley*, established a standard for review of "reasonable probability of a different outcome of the trial." This standard permits consideration of the cumulative suppression by allowing the reviewing court to pick and choose among the various factors influencing the trial, placing emphasis as it chooses, "as if disclosed by the government." In this case involving prosecutorial misconduct, the government could be considered in the most favorable light after the defense had been denied access, preparation, cross-examination and argument.

The Appeal Court's decision that the suppressions were not material accepts the role of government misconduct in a fair trial. The result is that the standard can be interpreted to tolerate a program of government misconduct. The door is open for prosecutors to enlist the IRS, with little risk or concern of exposure.

The Appeal Court's conclusion, without explanation, that the suppressed IRS assessments were not material and the suppressed audit results could be ignored, condones a pattern of suppression and government misconduct that Justice Stevens anticipated and warned against in his dissent in *Bagley*, 105 S.Ct. 3375, 3400, that the standard creates an incentive for prosecutors to "gamble, to play the odds, to take a chance that evidence will later turn out not to have been dispositive." He also noted the Court's statement in *U.S. v. Agurs* that "..when the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

After the *Bagley* case, this Court dealt with the question of materiality in the *U.S. v. Gaudin* case by unanimously affirming the constitutional right of a defendant to have a jury determine, beyond a reasonable doubt, the guilt of every element of the crime charged. *U.S. v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444, 458 (1995).

However, in practice this right remains qualified by *Bagley*,. The standard for review in *Bagley* is reasonable probability of a different outcome rather than guilt beyond a reasonable doubt. Materiality is determined by the reviewing court.

The standards in Gaudin and Bagley are in conflict, the directions of proof are opposite, and the degrees of proof are different for the same situation.

It is timely to address this conflict, and to close the door on an opportunity and incentive for the spread of this insidious government misconduct. There can never be confidence in the outcome of a trial when witnesses are subject to the threat of a

substantial secret tax penalty assessment and favorable audit results are withheld.

This Court's review is required to avoid undermining public confidence in the outcome of this trial, and to avoid undermining public confidence in the good faith of the government and the outcome of any trial.

CONCLUSION

In light of the foregoing, Nielsen respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and subsequently reverse the decision below.

June 15, 1998

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Appendix A - Order of the United States Court of Appeals for the Ninth Circuit, filed January 15, 1998, denying a petition for rehearing and rejecting a petition for rehearing en banc on the memorandum decision

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 96-16043

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
EDWARD S. NIELSEN,
Defendant-Appellant.

ORDER

Before: THOMPSON, T.G. NELSON, and KLEINFELD, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix B - Memorandum decision of the United States Court of Appeals for the Ninth Circuit, filed October 27, 1997, affirming the District Court's denial of the § 2255 motion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 96-16043

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
EDWARD S. NIELSEN,
Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
For the District of Hawaii
Samuel Conti, District Judge, Presiding

Submitted October 20, 1997**

Before: THOMPSON, T.G. NELSON, and KLEINFELD, Circuit Judges.

Edward S. Nielsen, a federal prisoner, appeals pro se the district court's denial of his 28 U.S.C. § 2255 motion to correct his sentence following his conviction by a jury for aiding and abetting the submission of fraudulent tax returns in violation of 23 U.S.C. § 7206(2). We review de novo a district court's denial of a § 2255 motion and review for clear error its factual findings. *See United States v. Span*, 75 F.3d 1383, 1386 (9th Cir. 1996). We have jurisdiction pursuant to 28 U.S.C. § 2255, and we affirm.

Federal Rules of Evidence 404(b) and 403

Nielsen argues that the district court should have excluded testimony by Adam Ferrif pursuant to Federal Rule of Evidence 404(b) as a prior criminal act improperly used to prove Nielsen's character and show that he acted in conformity therewith. This argument lacks merit because the testimony was probative of Nielsen's knowledge and intent regarding his under-reporting his employer's tax liability. *See* Fed. R. Evid. 404(b).

Nielsen's alternative contention that the district court should have excluded Ferrif's testimony pursuant to Federal Rule of Evidence 403 lacks merit because no objection on this basis was made at trial, and Nielsen has not demonstrated plain error. *See United States v. Sitton*, 968 F.2d 947, 958 (9th Cir. 1992).

Jencks Act and *Brady* v. Maryland Disclosures

Nielsen contends that the government violated the Jencks Act and *Brady* by failing to disclose various documents. This contention lacks merit as to the Jencks Act because the information that Nielsen requested does not constitute statements by government witnesses. *See* 18 U.S.C. § 3500(b) & (e) (1994); *United States v. Alvarez*, 86 F.3d 901, 905-06 (9th Cir. 1996), cert. denied, 117 S.Ct. 748 (1997). Nielsen's *Brady* contentions fail because he has not demonstrated the materiality of the evidence allegedly withheld by the government. *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit court except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a), 9th Cir. R. 34.4.

Perjury by Government Witnesses

Nielsen contends that Ferrif committed perjury when he testified that Nielsen admitted under-reporting the excise tax liability of a former employer, and that the government knew of Ferrif's perjury. This contention lacks merit because Nielsen failed to demonstrate that Ferrif's testimony was in anyway untruthful, much less that Ferrif committed perjury with the government's knowledge. *See Stein v United States*, 390 F.2d 625, 626-27 (9th Cir. 1968).

Ineffective Assistance of Counsel

Nielsen contends that his trial counsel, Stephen Pingree, was ineffective on several grounds. This contention lacks merit. A successful ineffective assistance of counsel claim requires a defendant to show deficient performance by his attorney and prejudice from that deficiency. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A. Federal Rule of Evidence 404(b)

Nielsen's contention that Pingree was ineffective for failing to invoke Federal Rule of Evidence 404(b) lacks merit because, as discussed above, the challenged testimony by Ferrif did not violate that rule. *See Baumann v United States*, 692 F.2d 565, 572 (9th Cir. 1982) (stating that attorney's failure to raise meritless legal argument does not constitute ineffective assistance of counsel).

B. Preindictment Delay

Nielsen's contention that Pingree was ineffective for failing to challenge the government's delay in bringing the indictment lacks merit because Nielsen was indicted promptly after the government concluded its investigation. *See United States v. Lovasco*, 431 U.S. 783, 795-96 (1977) (stating that preindictment delay caused by the government's investigation does not violate due process). Accordingly, Pingree was not

ineffective for failing to challenge the timing of the indictment. *See Baumann*, 692 F.2d at 572.

C. New Trial Motion

Nielsen's contention that Pingree was ineffective for failing to move for a new trial is without merit because Nielsen failed to identify any bases upon which Pingree could have made a nonfrivolous new trial motion. *See* Fed. R. Crim. P. 33; *Baumann*, 692 F.2d as 572.

D. Pretrial Discovery

Nielsen contends that Pingree provided ineffective assistance of counsel because he failed to investigate and obtain witnesses and documents supporting Nielsen's defense that he lacked intent to violate the tax laws. Nielsen also styles this claim as a denial of his right to compulsory process of witnesses. However denominated, this contention lacks merit.

Nielsen's allegations regarding the inadequacy of Pingree's pretrial discovery are contradicted by the declarations of Pingree, of the IRS case agent responsible for Nielsen's prosecution, and of a custodian of records for an accounting firm. Based on these declarations, the district court found that Pingree investigated every witness Nielsen was able to identify, and that the witnesses and documents that Nielsen did not obtain either do not exist or would not have aided Nielsen's defense. These findings by the district court are not clearly erroneous. *See Span*, 75 F.3d at 1386. Accordingly, Nielsen has not demonstrated prejudice from Pingree's alleged failure to investigate and obtain witnesses and documents. *See Strickland*, 466 U.S. at 694.

E. Tax Memorandum

Nielsen's argument that Pingree was ineffective for failing to place greater reliance on a tax memorandum that was in evidence lacks merit because it was previously addressed in

Nielsen's direct appeal of his conviction. *See United States v. Nielsen*, 1 F.3d 825, 861-62 (9th Cir. 1993); *see also Stien v. United States*, 390 F.2d 625, 626 (9th Cir. 1968) (stating that issues decided on direct appeal may not be revisited in § 2255 motion).

F. Miscellaneous Bases

Finally, Nielsen contends that Pingree was ineffective because he made unwarranted predictions in his opening statement, failed to adequately prepare witnesses for trial, and failed to provide Nielsen with a complete file when he withdrew from the case. Nielsen also contends that he was prejudiced from the cumulative effect of Pingree's errors at his trial. These contentions lack merit because Nielsen has failed to demonstrate "a reasonable probability that, but for" the alleged errors, "the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694.

Conflict of Interest

Nielsen contends that Pingree suffered a conflict of interest due to Nielsen's inability to pay his legal fees. This contention lacks merit. Nielsen has merely reiterated a number of his ineffective assistance allegations and added his unsupported opinion that they were caused by his inability to fully compensate Pingree for his services. These allegations do not demonstrate an actual conflict of interest. *See Cuyler v. Sullivan*, 466 U.S. 335, 348 (1980); *cf. Bonin v. Calderon*, 59 F.3d 815, 827 (9th Cir. 1995) (rejecting conflict claim and noting that pro bono counsel's responsibility for litigation expenses generally does not create conflict of interest), cert denied, 116 S.Ct 718 (1996).

Denial of an Evidentiary Hearing

Finally, Nielsen contends that the district court improperly denied his request for an evidentiary hearing. Because the record before the district court conclusively demonstrated that

Nielsen was not entitled to relief, the district court did not abuse its discretion in denying Nielsen's request for an evidentiary hearing. *See* 28 U.S.C. § 2255 (1994); *see Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994).

AFFIRMED.

Appendix C - Order of the United States District Court for the District of Hawaii denying defendant's motion to vacate sentence under § 2255, filed October 30, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case No. CR-91-1000-SC

UNITED STATES OF AMERICA,
Plaintiff,
Vs.
EDWARD S. NIELSEN
Defendant.

ORDER RE DEFENDANT'S MOTION TO VACATE SENTENCE UNDER § 2255

I. INTRODUCTION

Defendant Edward S. Nielsen ("Nielsen") moves the Court to vacate his sentence pursuant to 28 U.S.C. § 2255. Plaintiff the United States of America ("the government") argues that most of the issues raised are improperly before the court, and, as to the others, Nielsen has failed to substantiate his allegations.

II. BACKGROUND

On March 2, 1992, a federal jury found Nielsen guilty of three counts of violating Title 26, United States Code, Section 7206(2), aiding and abetting in the filing of false and fraudulent quarterly federal transportation excise tax returns in conjunction with the operation of Mid Pacific Airlines. On May 13, 1992, this court sentenced Nielsen to three years imprisonment on count one, three years imprisonment on count two to run concurrent to count one, and three years

probation as to count three to run consecutive to counts one and two.

Nielsen appealed his conviction and the jury verdict was affirmed by the Ninth Circuit on June 14, 1993. *See United States v. Nielsen*, 1 F.3d 855, 861 (9th Cir. 1993). Nielsen sought a rehearing en banc which was denied on September 27, 1993. Following this denial, Nielsen sought certiorari to the Supreme Court. *Nielsen*, 114 S.Ct. 1410 (1994). This petition was denied by the Supreme Court on April 4, 1994. Nielsen now seeks habeas corpus relief.

III. DISCUSSION

Nielsen identifies in his moving papers eight issues that justify vacating his sentence: (1) the government failed to disclose Jencks Act material; (2) the government knowingly permitted perjured testimony; (3) the government suppressed material evidence; (4) there was prejudicial pre-indictment delay; (5) he received ineffective assistance of counsel at trial; (6) during the post-trial state, defense counsel had a conflict of interest; (7) he was denied his right of compulsory process and his right to confront witnesses; and (8) he was denied his right to appeal. The court finds none of Nielsen's allegations merit habeas corpus relief.

(1) Disclosure of Jencks Material

The Jencks Act, 18 U.S.C. § 3500, requires the government to produce statements made by the government witnesses which concern the subject of their testimony. Specifically, the Jencks Act requires that after a government witness has testified on direct, the government must give the defendant any statement, as defined by the Act, in the government's possession that was made by the witness relating to the subject matter to which the witness testified. *U.S. v. Boshell*, 952 F.2d 1101, 1104 (9th Cir. 1991). A "statement" is defined as (1) a written statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially verbatim,

contemporaneously recorded transcription of the witness' oral statement. *Id.*

Nielsen argues the government withheld Jencks Act information, such as (1) Memorandum of Interview not provided to the defense; (2) information about penalty assessments against government witnesses; and (3) audits the government conducted of his prior employer.[1] The court finds these documents do not constitute Jencks Act material. The government contends the Memoranda of Interviews were not adopted by the respective witnesses and do not contain quotes from those witnesses. Nielsen offers no evidence to cause the court to question the government's assertions. As to the penalty assessments and audit information, the government contends and the court finds no basis to believe that these materials were prepared by or even adopted by any government witnesses.

(2) Use of Perjured Testimony

Nielsen argues the government knew there was false testimony and knowingly failed to disclose the false testimony to the court or Nielsen. The court finds the testimony Nielsen objects to represents nothing more than inconsistent testimony among witnesses and testimony with which Nielsen disagrees.

Nielsen argues the testimony of Gustafson, Ferif (sic), and Leninger (sic), is inconsistent as it relates to the date when Gustafson first informed Ferif of the discrepancies in Mid Pacific's excise tax payments. Ferif and Leninger stated they learned of the discrepancies in August, while Gustafson stated he did not recall the exact dates, but thought he told Ferif in late May or early June. According to Nielsen, this

[1] After trial, defendant conducted an intense discovery of materials used and not used at trial, such as the Special Agent's Report which shows Memoranda of Interview.

inconsistency demonstrates blatant perjury by someone. Differing recollection alone does not establish perjury, however. Moreover, even if this inconsistency occurred because of one witness' mendacity, there is no support for Nielsen's allegation that the government knew about and permitted this falsehood.

Nielsen nonetheless states the government itself committed perjury by stating in its closing argument that these witnesses all testified the same, when in fact there was this inconsistency. The court finds the alleged inconsistency is inconsequential as it relates to Nielsen's defense. What is significant is the fact that these witnesses were in agreement regarding the important issue of why Nielsen underpaid the excise taxes. (*Emphasis supplied*) The government argues and the court agrees that the closing argument referred to their statements in general, not specific statements.

Nielsen also objects to Ferif's testimony that Nielsen stated it was not an uncommon practice in the airline industry to report a different set of figures to the IRS than those existing on the books, and that he had done it before at previous employment. Nielsen claims he never made this statement, and that his attorney knew of two witnesses who could corroborate this claim. Nielsen's denial of the statement does not make the statement false, nor does the denial substantiate perjured testimony. Moreover, once again, Nielsen fails to substantiate how the government knew or should have known Nielsen never made this statement.

Lastly, Nielsen objects to Ferif's statement that he did not feel qualified to offer an opinion on whether it was an acceptable accounting practice to report to the IRS a different figure than appeared on the books. The court fails to see how being unqualified to answer a question constitutes perjury, without further evidence by Nielsen that Ferif was in fact qualified. More importantly, however, Nielsen once again fails to demonstrate how the government should have known

that Ferif's unwillingness to offer an opinion constituted perjury.

(3) Withholding Exculpatory Information

Nielsen alleges the government withheld exculpatory evidence. Specifically, Nielsen alleges that (1) the government had the opportunity to remove exculpatory Grant Thornton files, transportation tax files, and his working files; (2) the government withheld the "third tax memorandum," and (3) the government withheld the "exculpatory results of two IRS audits at petitioner's former employer."

Nielsen offers insufficient support for his allegations that the government had the opportunity and executed the removal of exculpatory documents from Grant Thornton files, transportation files, and working files. While Nielsen argues there were five additional boxes of Grant Thornton files never shown to Nielsen, the government provides evidence that these boxes never existed, and that Nielsen was permitted access to every available, relevant document. The only documents apparently not shown to him were documents concerning a tax period outside of the relevant period. Nielsen fails to provide any evidence that would lead this court to believe relevant, let alone exculpatory, documents were withheld from Nielsen.

As to the "third tax memorandum: to which Nielsen continuously refers[2], the evidence presented shows a greater likelihood that this document never existed. The government provides the declarations of two persons who maintain they have never seen this "third tax memorandum: as well as the declaration of the custodian of records of copies of Grant Thornton's files who claims he never found the documents repeatedly asked for by Nielsen, even after conducting an exhaustive search.

[2]Nielsen claims this memorandum would have negated any inclination for wrongful intent on the part of Nielsen.

Even if this "third tax memorandum" existed, there is no evidence the government was aware of its existence and purposely withheld it. The government contends the document never existed. Nielsen himself cannot even recall the date or author of this report, despite its apparent significance in proving his innocence. There also is no evidence that the tax memorandum would have had any prejudicial effect on the outcome of Nielsen's trial. The two earlier tax memoranda, which the third tax memorandum allegedly referenced and confirmed, and which allegedly legitimized Nielsen's form of tax payments, were already before the jury. Nielsen's theory for why he could and did underpay the IRS, therefore, was already before the jury. The jury apparently doubted his credibility.

As to the tax audit results, the court fails to see how tax audits from Nielsen's prior employer constitute exculpatory evidence. Nielsen claims the audits would have impeached Ferif's testimony that Nielsen told Ferif he handled taxes the same way at his prior employment. Nielsen fails to see that Ferif's testimony concerned oral statements made by Nielsen to Ferif, not actual conduct performed by Nielsen. Thus, proof that the conduct was not actually performed does not impeach Ferif, because Ferif was testifying as to what Nielsen said, whether it was true or not.

(4) Pre-indictment Delay

Nielsen claims the government improperly delayed indictment by waiting three years after completion of its investigation to indict Nielsen. Nielsen bases his argument on the fact that the Special Agent's report was completed in 1988, with a recommendation to criminally prosecute made in September 1988. Witnesses and documents were not subpoenaed by the grand jury, however, until 1990 and 1991. Moreover, there is an intent requirement under the applicable tax laws, which meant the government needed more than just proof that Nielsen underpaid the excise tax. Given this

additional element of proving tax fraud under 26 U.S.C. § 7206, the court does not find it unreasonable that the government took additional time to procure additional witnesses and documents. The government's indictment fell within the applicable statute of limitations, and in light of the specific elements of the offense of tax fraud, the court finds no pre-indictment delay.

Moreover, the court finds Nielsen's claims of prejudice are grounded in speculation, nothing more, which, in and of itself, does not support a complaint that a defendant's due process rights were violated by pre-indictment delay. *See United States v. Sherlock*, 962 F.d 1349, 1353 (9th Cir. 1992). First, the court is not persuaded by Nielsen's assertions that delay caused exculpatory material, such as the "third tax memorandum," to be lost or improperly withheld. *See* Pt.III(3), *supra*. The court is also not persuaded by Nielsen's claim than delay contributed to diminished memories on the part of the witnesses. The evidence demonstrates that the most critical witnesses did not claim they had any recollection of the relevant events; instead, their statements simply did not support Nielsen's defense.

(5) Ineffective Assistance of Counsel

Nielsen argues his attorney, Stephen Pingree, committed a myriad of errors which detrimentally prejudiced his trial. Nielsen alleges Pingree (1) failed to investigate defense evidence; (2) minimized the amount of work and effort because of Nielsen's inability to pay his fees; (3) failed to object to pre-indictment delay; (4) failed to properly conduct voir dire; (5) failed to object to Federal Rules of Evidence ("FRE:) § 404; (6) made statements in his opening statement regarding supporting evidence that was never introduced; (7) failed to argue the second tax memorandum, and introduce the third tax memorandum; (8) failed to move for a new trial; and (9) interfered with Nielsen's appeal.

The government first argues Nielsen's ineffective assistance claims must fail based on procedure, because most, if not all, of these claims were raised or should have been raised on direct appeal. The court finds two of Nielsen's claims have already been rejected by the Ninth Circuit, see *Nielsen*, 1 F.3d at 861; thus, will not be considered here. Those claims include Nielsen's assertion that counsel did not ensure an adequate voir dire was conducted and his assertion that counsel failed to argue memoranda Nielsen believed supported his position. As to the other claims, the court will entertain Nielsen's arguments, and judge their validity in accordance with applicable law.[3]

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was defective, and (2) the ineffective assistance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In looking at each of Nielsen's complaints against his counsel, the court finds, using an objective standard of reasonableness, *id.* at 687, that counsel's performance did not fall below the boundaries of reasonableness. Moreover, Nielsen has not shown to the satisfaction of this court that but for counsel's alleged deficient performance, "there is a reasonable probability that the result of the proceeding would have be different." *Id.* at 692.

[3] The government argues because the claims could have been raised on direct appeal, but were not, the court should not allow Nielsen to raise them now in an inefficient, piecemeal fashion. Since the court finds Nielsen unable to prove ineffective assistance as to any of his complaints, the court need not address at this time the issue of whether Nielsen's claims should be barred due to his direct appeal.

The court is unpersuaded by Nielsen's assertion that counsel failed to investigate cooperative witnesses or uncover key, exculpatory documents. First, there is sufficient evidence that counsel asked Nielsen to identify witnesses or documents that would support his position, which Nielsen refused to supply. Second, there is evidence that the witnesses listed by Nielsen, which counsel never had testify, would not support his position. Counsel's tactical decision not to call these possibly unsupportive witnesses will not form the basis for a claim of ineffective assistance of counsel. *Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984).

Lastly, as to Nielsen's claim he has uncovered new witnesses and documents which will support his position, Nielsen fails to present anything aside from conclusory allegations that these new witnesses or documents would, in fact, support his position, especially to an extent that would ultimately alter the jury's perception of Nielsen's culpability.

The court summarily rejects Nielsen's complaint that his attorney failed to object to pre-indictment delay. As this court already noted, there was no pre-indictment delay that warranted objection.

The court also rejects Nielsen's assertion that counsel should have objected to Ferif's testimony based on FRE 404(b) – prohibiting other crimes, wrongs, or acts from being introduced as character evidence to demonstrate conformity therewith. The relevant statements concerned why Nielsen underpaid the excise taxes, not prior acts. And, even if they were subject to 404(b), the evidence was admissible to show intent, given Nielsen's innocent mistake defense. *See* FRE 404(b). Not objecting to this testimony did not constitute deficient performance.

The court is also not persuaded by defendant's assertion that defense counsel improperly argued in his opening statement the existence of evidence that was never introduced. Even if the misrepresentation was found to be deficient, there is no evidence the jury was prejudiced by the misstatement.

As to counsel's failure to present the third tax memorandum, the court notes that counsel did admit a draft memorandum of Grant Thornton adopting Nielsen's position. The jury, nonetheless, was not convinced of Nielsen's innocence, and most likely doubted his credibility. The court is convinced that submitting similar memoranda would not have altered the jury's decision.

Lastly, the court rejects Nielsen's contentions that counsel improperly failed to move for a new trial, and interfered with Nielsen's appeal. As to the former, the court finds no evidence of prejudice as a result. Regarding the latter, the court finds insufficient evidence to support a claim for ineffective assistance. Moreover, he never mentioned the existence of such interference during direct appeal.

(6) Conflict of Interest by Defense Counsel

Nielsen claims his counsel had a conflict of interest because he "was trapped in a commitment for services that did not pay in advance his fee and his expenses, or provide funds for mainland witnesses," citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Contrary to Nielsen's belief, there was no conflict of interest present in this case. The facts presented by Nielsen are nowhere comparable to the facts presented in *Cuyler*. The court wholly rejects Nielsen's claim of conflict of interest.

(7) Denial of Right of Compulsory Process

Nielsen claims he was denied his right of compulsory process and his right to confront witnesses. The Court summarily dismisses this claim because the court finds no ineffective assistance of counsel or governmental misconduct.

(8) Denial of Right to Appeal

Nielsen claims his right to appeal was denied, because information was withheld from him that could have been used for appeal. The court also rejects this claim, as Nielsen's

primary basis for asserting it is his counsel's ineffective assistance of counsel, a claim the court has already rejected.

IV. CONCLUSION

For the foregoing reasons, the court hereby orders that defendant Edward Nielsen's § 2255 motion is DENIED.

IT IS SO ORDERED.
DATED: October 26, 1995

/s Samuel Conti
United States District Judge

Appendix D – Prosecution's Brady response letter

U.S. Department of Justice
United States Attorney
District of Hawaii

(In pertinent part)

We are in receipt of your request for discovery and inspection ....

The government is unaware of any exculpatory material at this time.

The government recognizes that both it and the defendant have a continuing obligation to disclose matters which, when discovered, come within the scope of the rules of discovery, and, in the case of the government, the *Brady* doctrine.

By s/ Dean D. Paik, Assistant U.S. Attorney

Appendix E – IRS Form re Gustafson

Person against whom the 100-percent penalty is being considered

(in pertinent part)

Richard K. Gustafson
already assessed
A criminal case for excise tax ... has been accepted by Department of Justice – Nielsen and Gustafson

Appendix F – IRS Form re Manuel

Recommendation re 100 Percent Penalty Assessment

(in pertinent part)

Tom P. Manuel – Controller

$310,960

Mr. Manuel was Controller of Corp. during the periods of liability [two quarters in 1987 and 1988]. ... Mr. Manuel and his Power of Attorney have neglected or refused to respond to [Revenue Officer ...] regarding this matter. Mr. Manuel is a responsible person under IRS 6672.

Signed by Revenue Officer 1-30-90

Appendix G – IRS From re Leininger

Recommendation re 100 Percent Penalty Assessment

(in pertinent part)

Mark Leininger – Acting Chief Financial Officer

$310,960

Mr. Leininger was aware of tax matters and is liable for [two quarters in 1987 and 1988]. Mr. Leininger was contacted by a NY RO Feb 1989, and refused interview.

Signed by Revenue Officer 6-8-89